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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/816,014	03/23/2001	Bernd Scholler	6056-000039	8518

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HARNESS, DICKEY & PIERCE, P.L.C.
P.O. BOX 828
BLOOMFIELD HILLS, MI 48303

EXAMINER

FERKO, KATHRYN P

ART UNIT	PAPER NUMBER
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3743

DATE MAILED: 09/26/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/816,014

Applicant(s)

SCHOLLER ET AL.

Examiner

Kathryn Ferko

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 23 March 2001.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-34 is/are pending in the application.
- 4a) Of the above claim(s) 17-34 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-16 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☒ Claim(s) 17-34 are subject to restriction and/or election requirement.

Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 23 March 2001 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 6.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

DETAILED ACTION

Election/Restrictions

1. Restriction to one of the following inventions is required under 35 U.S.C. 121:
 - I. Claims 1-16, drawn to a procedure for the control of a respirator, classified in class 128, subclass 898.
 - II. Claims 17-34, drawn to an apparatus for monitoring a respirator-treatment parameter, classified in class 128, subclass 204.18.
2. Inventions I and II are related as process and apparatus for its practice. The inventions are distinct if it can be shown that either: (1) the process as claimed can be practiced by another materially different apparatus or by hand, or (2) the apparatus as claimed can be used to practice another and materially different process. (MPEP § 806.05(e)). In this case the method can be performed on another apparatus and the apparatus can perform another method. The limitations of the apparatus such as an analyzer are not required for the method and, therefore, can be performed by another media. Additionally, the method requires setting at least two different pressure levels, which is not a requirement for the apparatus.
3. Because these inventions are distinct for the reasons given above and the search required for Group I is not required for Group II, restriction for examination purposes as indicated is proper.
4. During a telephone conversation with Donald Daley on September 23, 2002 a provisional election was made without traverse to prosecute the invention of Group I, claims 1-16. Affirmation of this election must be made by applicant in replying to this

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Office action. Claims 17-34 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

5. Applicant is reminded that upon the cancellation of claims to a non-elected invention, the inventorship must be amended in compliance with 37 CFR 1.48(b) if one or more of the currently named inventors is no longer an inventor of at least one claim remaining in the application. Any amendment of inventorship must be accompanied by a request under 37 CFR 1.48(b) and by the fee required under 37 CFR 1.17(i).

Drawings

6. The drawings are objected to under 37 CFR 1.83(a) because they fail to show element 14 as described in the specification. Any structural detail that is essential for a proper understanding of the disclosed invention should be shown in the drawing. MPEP § 608.02(d). A proposed drawing correction or corrected drawings are required in reply to the Office action to avoid abandonment of the application. The objection to the drawings will not be held in abeyance.

Specification

7. The disclosure is objected to because of the following informalities: page 7, line 11 makes reference to an element 14. There does not appear to be a corresponding element depicted in the drawings. Either the specification needs to be amended to refer to an existing figure number or the drawings amended to include an element 14.

Appropriate correction is required.

Claim Rejections - 35 USC § 112

8. The following is a quotation of the second paragraph of 35 U.S.C. 112:

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The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter, which the applicant regards as his invention.

9. Claim 1 recites the limitation "the respirator-treatment parameter" and "the time-wise evolution" in lines 4 and 6. There is insufficient antecedent basis for these limitations in the claim.

10. Claim 3 recites the limitation "the frequency," "the stimulating stream," and "the patient" in lines 3 and 4. There is insufficient antecedent basis for these limitations in the claim.

11. Claim 3 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. The use of parenthesis renders the claim indefinite for the scope is unclear.

12. Claim 7 recites the limitation "the context" in line 2. There is insufficient antecedent basis for this limitation in the claim.

13. Claim 12 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. The use of "and/or" renders the claim indefinite for the scope of the claim and the manner of combination are unclear.

Claim Rejections - 35 USC § 102

14. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

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(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

The changes made to 35 U.S.C. 102(e) by the American Inventors Protection Act of 1999 (AIPA) do not apply to the examination of this application as the application being examined was not (1) filed on or after November 29, 2000, or (2) voluntarily published under 35 U.S.C. 122(b). Therefore, this application is examined under 35 U.S.C. 102(e) prior to the amendment by the AIPA (pre-AIPA 35 U.S.C. 102(e)).

15. Claims 1-16 are rejected under 35 U.S.C. 102(a or e) as being anticipated by Axe et al.

Axe et al. disclose a procedure for the control of a respirator device, in which one can set at least two different pressure levels for a breathable gas supply and in which at least one respirator-treatment parameter is captured by measurement technique and is evaluated for the control of respirator-treatment pressure, as recited in column 5, lines 1-5; at least one of the respirator-treatment parameters is modified as a function of a pattern recognition, as recited in column 3, lines 48-67 and column 4, lines 1-63; in order to carry out the pattern recognition time-wise evolution of at least one respirator-treatment parameter is captured, at least at intervals, and is analyzed with respect to typical evolution patterns, as recited in column 5, lines 55-65; an existing pressure level for breathing support that is overlaid at least temporarily with a stimulating stream oscillating at a defined frequency, as recited in claims 1-7; a selective evaluation

of an oscillatory pressure amplitude, that occurs with a frequency of a stimulating stream in the air delivery of a patient; a selection of the respective pressure amplitude is carried out, as recited in column 5, lines 9-32; a CPAP respirator treatment that is carried out, as recited in column 1, lines 15-16; at least one electrical signal that is evaluated during the pattern recognition; a physical signal that is evaluated during the pattern recognition; a derivation of classes of errors that is implemented in the context of the pattern recognition, as recited in column 11, lines 1-6; an OPS signal (Oscillating Pressure Signal) is evaluated; as seen in figures 2-4; a static pressure that signal is evaluated; as seen in figures 4-8; a pressure variation that is evaluated, as recited in claims 1-7; flow signal is evaluated; a signal proportional to the flow signal or to a pressure-dependent signal is evaluated, as recited in the claims; an electrical-drive parameter of the compressed-gas supply that is evaluated; pattern recognition, in which distinctive form and time features are evaluated; and a class assignment.

Conclusion

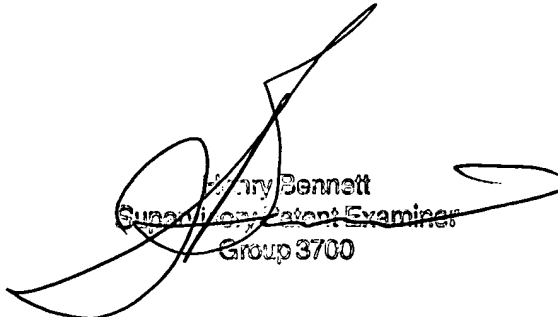
16. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure are as follows: US Patent No. 6,257,234; US Patent No. 6,435,182; US Patent No. 6,220,244; US Patent No. 6,367,474; US Patent No. 4,414,982; US Patent No. 5,617,846; US Patent No. 5,881,724; US Patent No. 5,937,853; US Patent No. 6,105,575; US Patent No. 6,360,740; US Patent No. 5,107,830; US Patent No. 5,540,219; US Patent No. 5,558,086; and US Patent No. 5,937,854.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kathryn Ferko whose telephone number is (703) 306-3454. The examiner can normally be reached on M-F (7:30-5:00) First Friday Off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Henry A Bennett can be reached on (703) 308-0101. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9302 for regular communications and (703) 872-9303 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1113.

KF
September 24, 2002



Henry Bennett
Supervisory Patent Examiner
Group 3700